case the original affidavit filed was defective in two respects, namely, that it neither verified the original debt nor verified the assignment of it, but the former defect had been cured by the subsequent affidavits and the latter defect had been cured by the production of the assignment before the master (*Begg* v *Cooper*[6]). It was therefore the submission of Encik Hisham that any defect in the original affidavit was not fatal to the application for final judgment and could be rectified and was so rectified by the filing of a corrective supplementary affidavit. Counsel also referred to the following passage in the *Supreme Court Practice 1985* Vol I at p 149:

> The evidence on an appeal to the judge in chambers should ordinarily be the same as it was before the master or district registrar; but since such an appeal is dealt with by way of an actual rehearing of the application which led to the order under appeal, and the judge treats the matter afresh as though it came before him for the first time, save that the party appealing has the right as well as the obligation to open the appeal, it would seem that the judge in his discretion is free to admit fresh evidence, and he frequently does so in the absence of special reasons (see *Evans* v *Bartlam* [1937] AC 73; *Krakauer* v *Katz* [1954] 1 WLR 278; [1954] 1 All ER 244, CA).

I have considered the short supplementary affidavit affirmed by Encik Ahmad Hisham Kamaruddin on 24 September 1987, wherein he has simply stated that he verily believed that the defendant had no defence to the plaintiff's claim and that the defence filed was for the purpose of delay and an abuse of the process of the court. I agreed that the filing of that short supplementary affidavit to cure a minor defect did not prejudice the defendant in any way and therefore accepted it.

Having considered the arguments of both counsel I confirmed my decision in chambers dated 23 December 1987, when I agreed with the learned senior assistant registrar that there were no triable issues in this case and that leave for judgment should be granted for the plaintiff to enter judgment against the defendant as prayed for.

Appeal dismissed.

Solicitors: *Messrs Skrine & Co; Messrs Hisham & Seow Si.*

Reported by *Wong Kim Fatt*

Syarikat Lean Hup (Liew Brothers) Sdn Bhd v Cheow Chong Thai

HIGH COURT (KUALA LUMPUR) – CIVIL APPEAL NO 11-9-1987
MUSTAPHA HUSSAIN J
26 MAY 1988

Contract – Housing developers – Contract not in terms prescribed by law – Parties unaware – Mutual mistake of law – Rectification – Housing Developers (Control and Licensing) Act 1966 – Specific Relief Act 1950, ss 30, 31, 32 & 33 – Housing Developers (Control and Licensing) Regulations 1982, Reg 12, Schedule E, cll 4(1) & 19

Land Law – Housing developers – Delivery of vacant possession – Whether includes connection of water and electricity supplies – Whether certificate of fitness for occupation necessary for delivery of vacant possession – Computation of damages for late delivery – Housing Developers (Control and Licensing) Act 1966 – Housing Developers (Control and Licensing) Regulations 1982, Schedule E, cll 4(1) & 19

The appellants, who were housing developers, had entered into a sale and purchase agreement with the respondent on 30 July 1982 in respect of a house in their housing project. The agreement was expressed to be subject to and in compliance with the Housing Developers (Control and Licensing) Act 1966 and the amendments thereto and the rules made thereunder. The agreement provided for delivery of vacant possession of the property to the respondent within 18 months of the date of the agreement and also that in the event of late delivery the appellants were to pay damages calculated on a daily basis at the rate of 8% pa on the purchase price from the agreed date of delivery up to the actual date of delivery.

The parties were unaware at the time of the making of the agreement that the Housing Developers (Control and Licensing) Regulations 1982 had come into force and which provided for a delivery period of 24 months and for damages to be calculated at the rate of 10% pa.

The appellants had issued a letter dated 20 September 1984 to the respondent stating that the house had been completed and asking her to collect the keys to the house. It was common ground that the practical completion of the house was effected on 22 September 1984. However, the water and electricity supplies were connected only on 20 February 1986. The respondent eventually commenced an action for damages for late delivery of vacant possession. At the time of the trial, ie 18 September 1986, the certificate of fitness for occupation had still not been issued.

The first question that arose was as regards the applicability of the Regulations to the contract and the second was as regards what constituted delivery of vacant possession. The standard form sale and purchase agreement prescribed by the Regulations provided that upon the vendor's architect certifying that the construction of the building had been completed and the purchaser having paid all the moneys payable, the vendor shall let the purchaser into possession but that such possession shall not give the purchaser the right to occupy the building and that the purchaser shall not occupy the building until the certificate of fitness for occupation was issued.

Held, dismissing the appeal: (1) It was the clear intention of the parties to comply with the provisions of the relevant law,

namely, the Act and the Regulations. There being a mutual mistake of law, the terms of the contract had to be rectified so as to comply with the Regulations. The delivery period was therefore 24 months and the damages were to be calculated at the rate of 10% pa.

(2) Vacant possession within the terms of the agreement had to include the connection of water and electricity supplies to the building. At the time when the appellants handed over the keys to the respondent, there had only been practical completion of the house. The water and electricity supplies having been connected on 20 February 1986, that date was the date of delivery of vacant possession. The certificate of fitness for occupation was not a sine qua non for the connection of water and electricity supplies and was distinct and separate from the issue of vacant possession. In any event, the connection of water and electricity supplies does not make a house fit for occupation.

[*Editorial Note*: The appellants have lodged an appeal to the Supreme Court vide Supreme Court Civil Appeal No 155 of 1988.]

Case referred to

1 *Jervis* v *Howle and Talke Colliery Co Ltd* [1937] Ch 67 (folld)

Legislation referred to

Housing Developers (Control and Licensing) Act 1966
Housing Developers (Control and Licensing) Regulations 1982, Schedule E, cl 19
Specific Relief Act 1950 s 30

Wilfred Abraham (*S Santhana Dass* with him) for the appellants.

SK Lingam for the respondent.

Cur Adv Vult

Mustapha Hussain J: The appellants are housing developers of a housing project known as Taman Permai Jaya in Mantin, Negeri Sembilan. The respondent is a purchaser of one of the houses, lot no 5644, built by the appellants for the sum of $48,000.

Both the appellants and the respondent entered into a sale and purchase agreement on 30 July 1982, which is subject to and in compliance with the Housing Developers (Control and Licensing) Act 1966 and the rules and amendments thereto.

Clause 12 of the said sale and purchase agreement states that the building (ie the house) *shall be completed and be ready for delivery of vacant possession to the purchaser* (ie the respondent here) *within eighteen (18) months from the date of the agreement* and that if the said house is not completed and ready for delivery of vacant possession to the purchaser within the aforesaid period, then the developers (ie the appellants) shall pay to the purchaser (respondent) agreed damages calculated from day to day at the rate of 8% pa on the purchase price of the house from the date due for delivery of vacant possession to the date of actual delivery of vacant possession.

At the trial before the magistrate, the respondent gave evidence. The respondent agreed that she received a letter from the appellants dated 20 September 1984 stating that the house had been completed and asking her to collect the keys to the house. But there was no certificate of fitness for occupation and the road and drain had not been completed at the time she received the letter from the appellants.

The road and drain were only completed in February 1986. The respondent claimed damages at 10% (not at 8% as stated in the agreement) from 30 January 1984 to February 1986 (30 January 1984 is the 18 months' completion date calculated from 30 July 1982, the date of signing of the agreement. Actually the 18 months' period from 30 July 1982 ends on 29 January 1984).

The parties when they drew up the agreement were not aware that the damages for late delivery of vacant possession have to be at 10% and not at 8% pa, calculated on a day to day basis. So too was the completion period which would be 24 months and not 18 months. This is in accordance with the Housing Developers (Control and Licensing) Regulations 1982, which came into force on 1 June 1982. The agreement herein between the parties was entered into some two months later on 30 July 1982 and how on earth the appellants (developers) were not aware of this is beyond comprehension as the agreement was signed before a lawyer.

But it was the clear intention of both parties to comply with the provisions of the relevant law ie the Housing Developers (Control and Licensing) Act 1966, and the Regulations made thereunder. This is beyond peradventure, a mutual mistake of law, and ss 30 to 33 of the Specific Relief Act 1950 would therefore come into operation.

It is clear law that if there is a mutual mistake, the terms of the contract have to be rectified to comply with the law. Had both parties been aware of the law, the agreement would have stipulated the damages for late delivery of vacant possession as 10% of the purchase price instead of 8% and the period for completion would have been stated as 24 months instead of 18 months, assuming the appellants/developers as shrewd developers would certainly take advantage of the law. Anyway it was the intention of both parties to enter into the agreement that conformed to the law.

Even though the respondent had not specifically pleaded for rectification of this mistake of law in the agreement, the court in its discretion may order rectification to express what both parties intended (see *Jervis* v *Howle and Talke Colliery Co Ltd*[1]). Section 30 of the Specific Relief Act 1950, speaks of:

> When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly ex-

press their intention, either party, ... *may institute a suit to have the instrument rectified: ... the court may in its discretion rectify the instrument so as to express that intention,...*

Accordingly, the sale and purchase agreement is hereby rectified to make it comply with the provisions of the Housing Developers (Control and Licensing) Regulations 1982 reg 12 and schedule 'E'. The damages for late delivery of vacant possession of the house will therefore be 10% of the purchase price and the period of completion 24 months from the date of entering into the agreement. The day to day damages will therefore have to be calculated from 29 July 1984 to date of delivery of vacant possession.

What is then the date of delivery of vacant possession? We must not be confused with the issuance of the certificate of fitness for occupation as these two are separate matters. Clause 19 of schedule E to the Housing Developers (Control and Licensing) Regulations 1982, makes it clear that upon issue by the vendor's architect of a certificate certifying that the construction of the said building (the house) has been duly completed and the purchaser having paid all the moneys payable ... 'the vendor shall let the purchaser into possession ...'

There is a proviso to this cl 19, which says that such possession shall not give the purchaser the right to occupy and the purchaser shall not occupy ... 'until such time as the certificate of fitness for occupation is issued'. Thus, a distinction is made between vacant possession and the issuance of the certificate of fitness for occupation.

According to the respondent, when she received the letter dated 20 September 1984 from the appellants, the developers, there was no certificate of fitness for occupation, no electricity and no water supply. The drain and road work was only completed in February 1986, and at the time of trial (18 September 1986) there was still no certificate of fitness for occupation issued. But under cross-examination, the respondent agreed that the driveway to the house was completed, so was the drain around the house. She did collect the keys to the house ten days after receiving the letter dated 20 September 1984 from the appellants. The main outlet drain and the access road had not been completed at that time.

The question now is when was this 'delivery of vacant possession'?

The appellants in their defence agreed that the main access road was completed in September 1984, the water and electricity mains were supplied on 20 February 1986, but at the time of writing the letter dated 20 September 1984, only the internal wiring and piping with the drains around the house and the driveway were completed. The contention of the appellants, the developers, is that delivery of vacant possession does not include the electricity and water connections to the house itself and it does not also include the main access road to the house.

An architect who gave evidence as a witness for the appellants in the court below stated that certification of practical completion means that the unit or house is completed and can be delivered. He further stated that the unit or house need not have the road outside and also the drain outside for practical completion, ie the infrastructure. The infrastructure was only completed on 22 September 1984.

An engineer too gave evidence on behalf of the appellants, who said that the access road was completed only on 22 September 1984.

It is common ground that the practical completion of the house was on 22 September 1984, that is, by then the access road, the drain around the house, the internal wiring and internal laying of water pipes were 100% completed.

The water and electricity supplies were only connected to the house on 20 February 1986.

According to the appellants, the date of practical completion of the house was 22 September 1984 and it was never claimed that this practical completion was the date of vacant possession. Looking at the third schedule under cl 4(1) of schedule E, which the parties have to comply with, item 3 states: 'On handing over of vacant possession and connection of water and electricity supply to the building' the purchaser will have to pay 95% of the purchase price leaving only 5% to be held by the vendors' (in this case appellants') solicitors as stakeholder, practically the full payment as far as the purchaser (the respondent) is concerned.

It is therefore clear that vacant possession has to include the connection of water and electricity, otherwise this item of connection of water and electricity would have been separated and shown as another item under cl 4(1) of schedule E. The sale and purchase agreement entered into between the appellants and the respondent will have to be rectified and read to conform with the terms of the third schedule.

The certificate of fitness for occupation is not in issue as it is distinct and separate from the issue of vacant possession as provided for under cl 19 of schedule E. In any event, the connection of water supply and electricity does not make the house fit for occupation. There are thousands of squatter huts which cannot qualify for a certificate of fitness for occupation, but still have water and electricity supplies. Nor, on the contrary, does the issuance of a certificate of fitness for occupation mean there is supply of water and electricity to the house, as one can see hundreds of houses do not have water and electricity even after the certificates of fitness for occupa-

tion had been issued. In fact, as in this instant case, according to the evidence of the respondent, 'the CF is not given to me till today' (ie the date of hearing of the case on 18 September 1986). Yet, there was connection of water and electricity on 20 February 1986. It is clear that the certificate of fitness is not a sine qua non for connection of water and electricity, though normally the water and electricity will only be connected after the issuance of the certificate of fitness for occupation.

Looking at the evidence, 20 February 1986 is the date on which the water and electricity supplies were connected to the house, and in the view of this court, this is the date of 'delivery of vacant possession', if one reads the terms in the third schedule under cl 4(1) of schedule E, item 3.

The appellants' witness in the court below had admitted that when the appellants called the respondent to hand over the keys on 20 September 1984, there was only what they themselves called 'practical completion' of the house. They did not even dare to use the phrase 'vacant possession'.

The 24 months for delivery of vacant possession of the house under the Housing Developers (Control and Licensing) Act 1966, from the date (30 July 1982) of execution of sale and purchase agreement should expire on 29 July 1984, and in view of the finding of this court that the date of delivery of vacant possession in this case was 20 February 1986, damages shall be calculated for the period 29 July 1984 to 20 February 1986, that is 569 days, at 10% of $48,000 which will work out to $7,482.74 with interest at 8% pa on this sum from 20 February 1986 till date of satisfaction.

The appeal is therefore dismissed with costs.

Order accordingly.

Solicitors: *Abdul Raman Saad & Associates*; *SK Lingam & Co.*

Reported by *PS Ranjan*

Koh Siak Poo v Perkayuan OKS Sdn Bhd

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C23-308-86
ZAKARIA YATIM J
29 APRIL 1988

Civil Procedure – Summary judgment – Application for – Whether plaintiff's claim based on agreement secured by fraudulent misrepresentation – Whether triable issues raised – Merits of application – Rules of the High Court 1980, O 14

The plaintiff was a logging contractor and the first and second defendants were limited companies. The third, fourth and fifth defendants were directors and guarantors of the first and second defendant companies. By a deed made between the plaintiff and the first and second defendant companies, in consideration of the plaintiff agreeing to forbear from further pursuing certain civil actions against them, the first and second defendant companies agreed to pay the plaintiff a sum of $3m. A cash payment of $50,000 was made but subsequent cheque payments were dishonoured. The plaintiff proceeded to apply for a summary judgment under O 14 of the Rules of the High Court 1980 against the defendants, contending that the defendants had wilfully failed and neglected to pay the plaintiff the said sum. The defendants denied wilful failure or neglect and contended that the agreement was secured by fraudulent misrepresentation.

Held, dismissing the application: This is not a proper case where summary judgment under O 14 should be granted. The defendants have an arguable case or have raised triable issues in their defence.

Cases referred to

1 *Citibank NA* v *Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (refd)
2 *Tan Chong & Sons Motor Co Ltd* v *Yang Chin Lang* [1967] 1 MLJ 123 (refd)

Legislation referred to

Evidence Act 1950 s 92 provisos (b) & (f)
Rules of the High Court 1980 O 14

Mahinder Singh Dulku for the plaintiff.
Dominic Puthucheary for the defendants.

Cur Adv Vult

Zakaria Yatim J: This is an application by the plaintiff for an order, under O 14 of the Rules of the High Court 1980, that the plaintiff be at liberty to sign final judgment in this action against the defendants for the amount endorsed in the writ, that is, $2,950,000 and interest at the rate of 14% pa on the sum claimed from 22 August 1985 until judgment and thereafter at the rate of 8% pa until payment or satisfaction. The applicant also asks for costs.

The plaintiff in his statement of claim averred as follows: At all material times, he was a logging contractor and resided at no 223, Jalan Bakar Sampah, Pekan Lama, Sungei Petani, Kedah. The first and second defendants were limited companies incorporated in the states of Malaya and had their principal offices at Leong Moh Building, 6¾ miles, Kepong, Kuala Lumpur. The third, fourth and fifth defendants were the directors of the first and second defendant companies and were guarantors of the first and second defendant companies. On 9 July 1984, the plaintiff commenced an action against the first defendant company in the High Court, Kuala Lumpur, vide civil suit no 2183 of 1984, for specific performance of an agreement dated 16 October 1982, for an interlocutory injunction and for damages for breach of contract. On the same date VC George J granted the interlocutory injunction ex parte. At a subse-